Supreme Court, U.S.
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No. 94-1662

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

On March 25, 1992, Musslewhite, Petitioner, filed a civil rights action pursuant to 42 U.S.C. §1983 against the State Bar of Texas, its Executive Director, General Counsel, and several members of the Board of Directors of the State Bar seeking injunctive, declaratory, monetary, and equitable relief. (*See* Appendices to Petition for Writ of Certiorari ("App."); A61). All claims made by Musslewhite revolve around alleged violations occurring in the context of the investigation and prosecution of Musslewhite for various acts of professional misconduct and during the proceedings for the revocation of Musslewhite's probated suspension from the practice of law.

The State Bar of Texas, Respondent, filed a Motion to Dismiss which was granted by the

District Court. (App. A57; Appendix C). On September 23, 1994, the Fifth Circuit Court of Appeals affirmed the judgment of the District Court primarily on the basis of *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)* and *Howell v. State Bar of Texas, 710 F.2d 1075 (5th Cir. 1983), cert. denied, 466 U.S. 950 (1984).* (App. A1).

STATEMENT OF FACTS

Two lawsuits were initiated against Musslewhite in the state district courts of Harris County, Texas, in 1986 and 1987. Each suit was brought by or on behalf of a grievance committee of the State Bar of Texas seeking disbarment, suspension, or reprimand of Musslewhite because of various acts of professional misconduct as alleged in the petitions filed. The two suits were

consolidated and prosecuted as a single suit. Musslewhite agreed to settle the disciplinary action by entry of an Agreed Judgment.

This Judgment provided that Musslewhite would be actually suspended from the practice of law for ninety (90) days, and would be on probation for three (3) years. The Agreed Judgment also provided that the probation could be revoked if Musslewhite violated any of the probationary terms.

Subsequently, a Motion to Revoke Probation was filed pursuant to the terms of the Agreed Judgment. After hearing by the trial court, Musslewhite's probation was revoked and he was ordered suspended from the practice of law for three (3) years, from January 31, 1989, to January 31, 1992.

Following entry of the Order revoking

Musslewhite's probation, he attacked the refusal of the trial court to stay the suspension pending appeal or to grant a supersedeas bond, filing first in the Texas Court of Appeals for the First District in Houston, Texas, and then in the Texas Supreme Court, a Motion for Leave to File a Petition for Writ of Mandamus, Prohibition, and Injunction. Both Courts denied Musslewhite's motions. Musslewhite also sought an application for stay from the United States Supreme Court which was also denied.

Musslewhite then perfected an appeal to the Texas Court of Appeals for the Fourteenth District in Houston, Texas, upon 23 points of error. All points of error were decided adversely to Musslewhite by the Court of Appeals and the judgment was affirmed. *Musslewhite v. State Bar of*

Texas, 786 S.W.2d 437 (Tex.App.--Houston [14th Dist.] 1990, writ denied) cert. denied, 501 U.S. 1251 (1991). Neither the Texas Supreme Court nor the U.S. Supreme Court found persuasive reasons to reexamine the matter.

In his appeal to the Fourteenth Court of Appeals and the Supreme Court of Texas, Musslewhite attacked the factual sufficiency of the evidence; the alleged procedural infirmities raised by Musslewhite in the action presented to the District Court; the constitutionality of Disciplinary Rule 2-101, Texas Code of Professional Responsibility; the alleged due process and equal protection violations, including selective prosecution and denial of a supersedeas bond; and every other deprivation claimed by Musslewhite in this action. In each court, Musslewhite's contentions were

considered and overruled.

Musslewhite's action is an attack on a valid, existing state court judgment, the sanctions of which have expired prior to the filing of this action. Musslewhite's suspension from the practice of law was completed on January 31, 1992. This action by Musslewhite raises substantially the same issues that have been litigated in the state courts and even in the Supreme Court of the United States.

OBJECTION TO JURISDICTION

Petitioner, Musslewhite asserts jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1), i.e., by writ of certiorari. However, Musslewhite has failed to establish jurisdiction pursuant to Rule 10.1(a) of the Rules of Supreme Court of the United States. The Fifth Circuit did not render a decision in conflict with the decision of another United States

court of appeals on the same matter. On the contrary, the decision is directly in line with other court of appeals decisions regarding attempts by lawyers to have their state court disciplinary judgments reviewed. Nor did the Fifth Circuit decide a federal question in a way in conflict with a state court of last resort.

Therefore, the petition should be denied for lack of jurisdiction.

ARGUMENT

I.
(In Response to Question No. 1)

Musslewhite did not raise a general challenge to the Texas disciplinary scheme.

The Fifth Circuit correctly found that all of Musslewhite's claims were either complaints regarding his particular case or were so

"inextricably intertwined" with his state court judgment of disbarment that the district court lacked jurisdiction to hear them.

The United States District Courts do not have jurisdiction over challenges to state court proceedings in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 463 (1983).* Nor may the District Court sit as an appellate court to review general constitutional claims which are "inextricably intertwined" with a state court judgment of reprimand. *Howell v. State Bar of Texas, 7109 F.2d 1075, 1077 (5th Cir. 1983), cert. denied, 466 U.S. 950 (1985).*

Although cast in alleged deprivations of

constitutional rights, a review of both Musslewhite's original complaint and brief filed with the Fifth Circuit and before this Court clearly shows that what Musslewhite seeks is nothing more than a review of the state court judgment of suspension and the disciplinary proceedings initiated against him.

By his own pleading, Musslewhite is complaining of actions taken with respect to his particular case which through judicial action, resulted in suspension. Nowhere in his complaint does Musslewhite challenge the constitutionality of a particular state bar rule or statute governing the profession promulgated in nonjudicial proceedings. All of Musslewhite's constitutional challenges are specific to his difficulties through the state disciplinary procedure.

His original complaint begins with a self-laudatory recitation of his career. (App. A61; Paragraphs 3.1-3.10). Beyond this, Musslewhite merely catalogues the proceedings taken against him beginning with the 1986 suit for professional misconduct, the Agreed Judgment, his understanding of the terms of the judgment, the revocation proceedings, the sufficiency of the State Bar's evidence, and the revocation itself which resulted in the judgment of suspension and concludes with the allegations that through these proceedings the State Bar conspired to violate his rights to freedom of speech, equal protection, and due process of law through their application of the state disciplinary scheme against him. (App. A61; Paragraphs 3.17-3.43).

One of his primary requests for relief is that

the Court "declare the agreed judgment against Plaintiff complained of herein, together with all proceedings related thereto, including the revocation judgment, to be void." (App. A61; Prayer #7).

Musslewhite's briefs in the appellate courts are presented with similar argument relating to the procedures taken against him including the refusal by the trial court to grant a supersedeas during appeal, the refusal of the trial court to grant a transfer of venue, the inequity of the degree of discipline, the absence of notice, the failure to grant a jury trial, and arguments concerning his rights of equal protection and First Amendment. Once again he details his decision to settle the original lawsuit, the "frivolous" revocation proceedings, and his "naivete in appealing" (in which he attacks the integrity of the courts of appeals and state supreme

court). Musslewhite does nothing more than argue the merits of the state disciplinary action and ask the District Court to sit as an appellate court and review the state court judgment.

Musslewhite asserts that he does make a general constitutional attack in what he refers to as the "class action general, constitutional attack on the Texas disciplinary scheme." However, as the Fifth Circuit recognized:

> "Musslewhite couched some of his averments in the language of a general constitutional attack on the State Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court is being asked to review."

32 F.2d 942, 947 (5th Cir. 1994).

This claim by Musslewhite is simply another attack

on the State Bar's procedures as applied to him. All of the evidence to which Musslewhite alludes goes solely to his disciplinary proceeding. Thus, this complaint has no merit.

II.
(In Response to Question No. 2)

The state courts addressed the First Amendment issue and Musslewhite's challenge regarding selective prosecution was never raised before the state courts.

The Texas disciplinary scheme is fully capable of considering the constitutional arguments of attorney-defendants relating to specific procedures followed in their case. *Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).* Furthermore, the United States Supreme Court has recognized the competence of state courts to adjudicate federal constitutional claims. *Feldman at 483. See, e.g., Sumner v. Mata, 449 U.S. 539*

(1981); *Allen v. McCurry, 449 U.S. 90 (1980)*; *Swain v. Pressley, 430 U.S. 372 (1977).*

In the case at hand, Musslewhite unsuccessfully challenged the sufficiency of the evidence and questioned the propriety of the action against him, raising the same issues that he has attempted to present to this Court including the constitutional claims of any fraudulent conduct or deception by the State Bar of Texas. In addition, the District Court may not entertain a general constitutional challenge to a state's disciplinary scheme when that challenge has not been presented to the state court in the first instance. *Thomas v. Kadish, 748 F.2d 276, (5th Cir. 1984). cert. denied, 473 U.S. 907 (1985).*

The state courts fully considered Musslewhite's First Amendment arguments and

clearly rejected his contention that the State Bar rule was unconstitutionally vague either on its fact or as applied. *Musslewhite v. State Bar of Texas, 786 S.W.2d 437 (Tex.App.--Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. 1251 (1991).* The fact that they did not address the issue to Musslewhite's satisfaction is irrelevant.

As to his claim of selective prosecution, Musslewhite did not properly raise this issue before the state courts and thus it cannot now be considered by the federal court. *Thomas v. Kadish, 748 F.2d 276, (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985).* It is irrelevant, even if true, that Musslewhite did not discern his facts at the time of the state court proceedings. No exception exists. Thus, to the extent he presented such defenses and challenges, they have been decided adversely to him

by courts of competent jurisdiction in both the state and federal systems. The judgments of those courts are entitled to full faith and credit by this court. To the extent Musslewhite chose not to present such defenses or issues, he has waived them and is now precluded from raising them for the first time in this court. *Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), cert. denied, 473 U.S. 907 (1985).* Under either view, presentation and determination or waiver of issues by not presenting them, Musslewhite is now barred from raising and litigating the claims contained in his complaint. Therefore, this point has no merit.

III.
(In Response to Question No. 3)

Musslewhite's claims of bad faith would require a collateral examination of the state court judgment.

No exception to the *Feldman* doctrine exists for allegations of bad faith. In the present case, the challenged state court judgment has already been fully "executed" and discharged. Musslewhite was suspended from the practice of law and has completed that suspension. That judgment imposes no further restraints or impediments upon Musslewhite's practice of law. Therefore, *Younger v. Harris, 401 U.S. 37 (1971)* is inapplicable as well.

IV.
(In Response to Question No. 4)

The Court of Appeals has the power to revise its judgment at any time before the mandate is issued.

Musslewhite complains that the Fifth Circuit did not have the ability to revise its judgment because it was bound to issue the mandate within

twenty (20) days of its initial judgment. However, the cases he cites in support of this position are inapplicable. Almost all have to do with the ability of the court to recall a mandate once it has been issued. The ones dealing with a stay of the mandate involve situations when a petition for writ of certiorari has already been denied.

In addition, in *United States v. Foumai, 910 F.2d 617 (9th Cir. 1990)*, the court held that the jurisdiction of the court of appeals does not terminate until issuance of the mandate. A court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte, or by motion of the parties.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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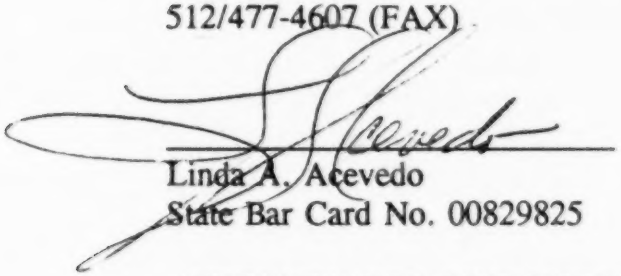

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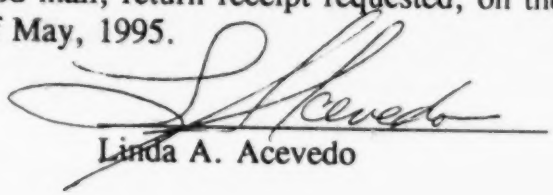
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Benton Musslewhite, 1520 Lyric Office Center, 440 Louisiana, Houston, Texas 77002, pro se, by delivery of true and correct copies to him by certified mail, return receipt requested, on the 3rd day of May, 1995.



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